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NOTES

THE USE OF THE INJUNCTION TO PREVENT CRIME. CASES INVOLVING PURPRESTURES AND PUBLIC HEALTH, SAFETY AND COMFORT.*

INTRODUCTION

It is well established law that courts of equity will not enjoin criminal acts as such. This has been recognized and is undisputed, as shown in another section of this study. Today many injunctions issue to prevent crime under the guise of protecting a property right in cases of public nuisances. This paper will treat the growth of the use of the injunction in public nuisance cases, which are crimes, in purprestures and public health, safety and comfort.

All purprestures that are public nuisances, and all breaches of the common law and statutory laws that are public nuisances are criminal acts, and if equity enjoins in such cases, its jurisdiction is essentially criminal. It will be shown that equity has assumed jurisdiction in criminal cases by the indirect method of enjoining public nuisances in the protection of public health, safety and comfort.¹

* This is the fourth of a series of notes on the use of the Injunction to Prevent Crime.

The following citations are helpful in a study of this problem:

The Progress of the Law, Equitable Relief Against Torts, Chafee, 34 Har. L. Rev. 388, 407 et seq.

Principles of Equity, Clark, Sec. 244.

Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 1890 and 1941.

Walsh on Equity, pp. 197-202.

16 Harvard Law Review 389, "Revival of Criminal Equity," Mack.

15 U. of Pa. Law Review—Chafee's, Does Equity Follow the Law of Torts.

Durfee on Equity, p. 592.

Chafee's, Cases of Equitable Relief Against Torts, 438.

28 Michigan Law Review 440—The Last Step in Criminal Equity.

31 Harvard Law Rev. 857—Some Aspects of 15th Century Chancery—Barbour.

Primitive Society and Ancient Law—Maines on Ancient Law 113.

21 Columbia Law Review 680—Title to Land Under Navigable Waters, Joseph B. Thompson.

Historical Jurisdiction, Vol. I, Vinogradoff.

¹ The term "public nuisance" applies only to something occasioned by acts done in violation of the law. 2 Green (N. J.) 75.

Courts of equity have long refused to take jurisdiction where there is no property right to be protected.² Many fictions have become embedded in the law because the courts have gone out of their way to find a property right on which to base their decisions.³ If, then, equity jurisdiction is based on a property right, what property right of the state is protected when equity assumes jurisdiction to enjoin public nuisances that are also criminal?

I. PROPERTY RIGHT OF THE GOVERNMENT IN LANDS AND SUBJECTS.

To answer this question we must look to early history. There are many theories of government, but research has established that the Aryan culture came early to England through the Celts and today many of the customs are preserved in Welsh Laws and Brehon Tracts of Ireland, also shown by the clans of the Scottish Highlands.⁴ Aryan culture was based on the patriarchal system which was a growth of the family with the father as despotic head. The father owned all the land and members of the family. Several of the more eminent authorities of early jurisprudence and early history agree that he had power of life and death, to sell, and to give in marriage over his children.⁵ "Marriage was by capture or purchase, causing the wife to be regarded as the husband's chattel."⁶ "The wife is the husband's property and, therefore, her offspring must be in his power too."⁷

The family grew into the tribe and the father, now called the patriarch, retained his despotic power. By conquest or by the joining of weaker tribes to stronger tribes for protection, the state came into existence. The early state retained the patriarchal system only in a less degree. The power of the father (*patria potestas*) in the Roman family is well known. According to Gaines it was an unbending absolute rule, in that the father could even put his son to death. His power over property was equally unlimited. The power of the father is

² *Gee v. Pritchard*, 2 Swanst. 402.

³ Pound 29 H. L. R. 640.

⁴ "Historical Jurisprudence," Vinogradoff, Vol. I, p. 230.

⁵ History of Ancient Law, Maine, p. 138.

⁶ Kohler.

⁷ Kovalevsky.

equally well known in English law in that he was allowed an action of trespass if the wife or children were taken.⁸ Another primitive custom of the patriarchal system known to English laws was the *hand fast marriages* which were protected as late as 1509.⁹

Blackstone said that the common law of his time totally disregarded the loss sustained by the inferior party to the family relation because the father had the property right in all the inferiors.¹⁰

The patriarchal system of government in its early stages shows the ruler was first the father of the family and tribe with full ownership of all property and members. Then as states and empires were founded this same patriarch became king with ownership of his subjects and property

The subject must be protected from violence and his health and comfort assured as they are necessary to his fitness to fight for the King.

Advancing civilization changed many things, among which were the recognition of the rights of the people and the dwindling of the King's ownership and power. The idea of the King's ownership of all public lands and his property in his subjects has prevailed and today traces are seen when it is said, "the state may go into equity not only as a property holder but also as a representative or guardian of the health and wealth and general interests of its citizens",¹¹ or as Chafee says "as *parens patriæ*—guardian of the peoples welfare"¹² A yet broader view given by Pomeroy is, 'as a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it. Hence, it follows that the government can obtain an injunction to restrain a public nuisance without showing a property right in itself. The duty of protecting the property rights of all its citizens is sufficient to warrant issuing the injunction'¹³ The latter is the United States

⁸ Fitzherbert Nat. Brev. 890 and 90 H.

⁹ The Genealogical History of the Earldom of Sutherland, Sir Robert Gordon, p. 95.

¹⁰ 3 Bl. Com. 142, 143.

¹¹ 13 California Law Review 63.

¹² 34 Harvard Law Review 395.

¹³ 5 Pomeroy's Equity Jurisprudence, 4th Edition, p. 4296.

rule and rightly such, because in a Republican form of Government the public property is in the people and not the Crown.

Now that we have found a property right in the government in its public lands and subjects upon which to base equity jurisdiction, we next turn to the problem of seeing how far it has gone toward prevention of crime by the use of the injunction in public nuisance cases.

II. BASIS OF EQUITY JURISDICTION IN PURPRESTURE CASES.

The property right of the state in public lands and navigable waters is well established. It seems as though the Crown never fully relinquished the old right of *Patna Protestas* to these lands and, although there is conflict as to its proprietary rights, there is no argument as to the rights it holds for the public use. Consequently, there is little trouble in establishing equity jurisdiction in these cases, because such jurisdiction is based upon this property right in the state.

One line of cases based upon the *Philpot Case*,¹⁴ expressly states that the Crown has a proprietary right in the navigable waters, owns all land between high and low water mark and exercises rights both *jus privatum* and *jus publicum*. These cases hold that any purpresture, any encroachment upon public water ways or highways, is subject to abatement in equity at the suit of the State whether it is a nuisance or not. This is not the weight of authority in either England or the United States.¹⁵ However, Illinois,¹⁶ South Carolina¹⁷ and one Federal case¹⁸ support this view.

The other view is that the Crown or State does not own as *jus privatum* but only as *jus publicum* and can enjoin a purpresture only in case it is a public nuisance.¹⁹ This seems to be the weight of authority and is upheld by writers of texts²⁰ and other authorities.²¹ The above view is erroneously held as shown

¹⁴ 4 Kay and J 295 m. (1628).

¹⁵ 21 Columbia Law Review 680.

¹⁶ 177 Ill. 468—52 N. E. 1052.

¹⁷ 20 S. Car. 514.

¹⁸ 176 U. S. 660.

¹⁹ 55 N. Y. Supp. 453 (1889), 85 N. E. 1093 (1903), 136 N. E. 224 (1922), also California.

²⁰ Walsh on Equity, note page 200.

²¹ Thompson 21 Columbia Law Review 680.

in earlier cases. Prior Tynemouth,²² Digge's Cases²³ and cases during the time of James I.²⁴ were all instances where the King tried to assert his right of jus privatum in the land between high and low water mark and made grants to his favorites at court. All these cases that came before the court were decided for the upland owner and held the King held such lands only as jus publicum. It is well known that Charles I in his efforts to get money, selected courts that would do his bidding and in 1628 the famous Philpot Case²⁵ was decided in favor of the Crown. But this case was reversed not long after the beheading of Charles.

Attorney General v Richards,²⁶ was the first case we have where an injunction was issued for a purpresture and a public nuisance. This was on an obstruction in the bay which interfered with the commerce and navigation to a town. Richards claimed title to the land which was disapproved and the court held the obstruction to be a public nuisance, and said "when the King claims and proves title to the soil where a purpresture and a public nuisance have been committed he will have a decree to abate it."

Other injunctions followed to enjoin purprestures which were public nuisances rather quickly *Attorney General v Parmeter*,²⁷ *Attorney General v Johnson*,²⁸ and *Attorney General v Burrudge*,²⁹ were all cases of obstructions in navigable waters which were interfering with commerce and public navigation and, as such, were public nuisances. From this it is seen that equity had expanded its jurisdiction to all purprestures which were public nuisances.

Purprestures not only applied to navigable waters but also to highways, streets or any publicly owned ground. Any obstruction of or encroachment on any highway or street is made a public nuisance per se by statute in most states whether they interfere with public traffic or not and will be enjoined by courts

²² Coram Rege 20 Edw. I roll 58 (1292).

²³ Anderson p. 86.

²⁴ *Atty. Gen. v. Riggs* and *Atty. Gen. v. Stephens Exch.* B & A. Southton Chas. I, 42.

²⁵ Supra, note 14.

²⁶ Anstruther 603 (1795).

²⁷ 10 Price 378 (1811).

²⁸ 2 Wils Ch. 87 (1819).

²⁹ 10 Price 350 (1822).

of equity One instance may be cited where a bay window which extended into the street about nine feet and did not interfere with the traveling public was declared a public nuisance. A statute declared a nuisance and ordered the removal of any obstruction in the street or anything that tended to narrow it. "The bay window does not obstruct travel but it does tend to narrow the street, therefore, it is a nuisance and injunction issues", was the ruling of the court in *State v. Kean*.³⁰ Another instance is the *First National Bank of Montgomery v Tyson*,³¹ where a bank, in building, had put its pillars out twenty-two inches on the side walk and it was declared a purpresture and public nuisance. The court said "a building or like structure erected on a street—which includes its sidewalks—without sanction of the legislature is a nuisance, that public highways belong from side to side and from end to end to the public and they are entitled to a free passage along any portion of it, not in use by some other traveler, and there can be no permanent use of the way for private purposes" So many cases are on record that there need be no more cited here.³²

The above cases show that equity has used the injunction to abate public nuisances which are purely criminal and to enforce criminal statutes. A still further use of the injunction to enforce the criminal statutes occurs where injunctions are issued in situations analogous to purprestures.

In *Attorney General v Jamaica Pond Aqueduct Corporation*,³³ the defendant company had a franchise to furnish water to the city They obtained their water from a public pond and the city council passed an ordinance against the company drawing the water from the pond below a certain level. The demand exceeded the supply of water and the company was about to draw the water below the level set out in the ordinance. The court was asked to enjoin the company from drawing more water from the pond. The injunction was issued, and the court said it was a purpresture and a public nuisance. The public had a right to boating and fishing in the pond. A property right vested in the State and a lowering of the water was an encroach-

³⁰ 45 Atl. 256 (1897).

³¹ 32 So. 144 (1902).

³² For further citations see Ames Cases in Equity, note p. 618.

³³ 133 Mass. 361 (1882).

ment upon that right, and it was a public nuisance in that mud and slime would be left on the banks.

The same type of reasoning was used in *Attorney General v Williams*.³⁴ An injunction was issued against the erection of a building above a certain height, as prescribed by city ordinance on Copley Square, Boston. The court said, "we hold that the statute gives rights in the nature of an easement over lands facing Copley Square, which easement is annexed to the Square for the benefit of the public for whose benefit Copley Square was laid out, and that these rights are similar in their nature to rights in highways, in great ponds and navigable waters of the Commonwealth. It is a purpresture which is in the nature of a public nuisance, and in equity is to be dealt with as a public nuisance"

A still further extension of purpresture is found in *Georgia v Tennessee Copper Company*.³⁵ This was a suit instituted by the State of Georgia to enjoin a factory in an adjoining state from letting loose obnoxious and poisonous gases which were causing great damage to property and inhabitants of Georgia. Five counties were affected. The injunction issued and the reasoning was analagous to that of purpresture. The Court said, "every state in such a case has a quasi sovereignty and as such has a right to demand that the air over its territory be free from obnoxious fumes and pure for the use of its citizens" Where the state is proceeding, it can go ahead on the purpresture rule or public nuisance, or both.

This case infers that the State could also base its jurisdiction on public health and safety and enjoin the nuisance, which brings us to discuss the jurisdiction of equity to protect the health and safety of the public.

III. EXTENSION OF EQUITY JURISDICTION TO PROTECTION OF HEALTH AND SAFETY.

As early as the 13th century, the health and safety of the people were protected by the courts. A writ of prohibition was issued to close a market³⁶ because of unwholesome food.

³⁴ 174 Mass. 476 (1899).

³⁵ 206 U. S. 230, 27 Sup. Ct. 618 (1909).

³⁶ Bracton's Note Book Case (1162).

Another instance is given where an open ditch,³⁷ dangerous to the traveling public, was ordered closed. These writs of prohibition were analogous to perpetual or interlocutory injunctions as issued by equity today³⁸

The first case where an injunction was issued to abate a public nuisance was Bond's Case.³⁹ The Queen held a reversion against a tenant who was erecting a pigeon house. The pigeon house was declared a common nuisance and abated. What was equity's basis for jurisdiction? There is no property right mentioned.

To abate a pigeon house must have been a protection of public health. It was shown above that the Crown had a property right in its subjects and, finding no mention made of any basis for jurisdiction, we assume the basis to have been founded on this property right in the Crown.

During the reign of Charles I, equity lost a great part of its power and not until near the 19th century do we hear of the injunction being issued to abate public nuisances. The courts were slow in exercising their rights but, soon after it once began to assert its rights and powers, it grew rapidly

The jurisdiction of equity in public nuisance cases to protect health and safety was well established early, as shown by Anonymous Case,⁴⁰ and *Barnes v Baker*⁴¹ Both of these cases dealt with small-pox hospitals. Although injunctions did not issue, Lord Hardwicke, while sitting in equity, says that in the case of public nuisances, an injunction by the Attorney General is a proper remedy. The first case was not proved a public nuisance and the second case was brought by the wrong party

In the case of the *London Corporation v Bolt*,⁴² an injunction was issued on the petition by the mayor to enjoin the defendant from using old houses to store sugar. Two of the houses had fallen under the weight and the others were a menace to the passersby. The court declared it a nuisance endangering lives but was slow in issuing the injunction, saying the mayor had a more effectual remedy. That equity was reluctant to enjoin a

³⁷ Bracton's Note Book Case (1253).

³⁸ Holsworth History of Law, Vol. II, p. 248.

³⁹ 238 Moore No. 372 (1587).

⁴⁰ 3 Atk. 750 (1740).

⁴¹ 1 Amb. 158 (1752).

⁴² 5 Ves. 129 (1799).

public nuisance is shown by Lord Eldon's refusing an injunction in the case of *Attorney General v Cleaver*⁴³ This was on information against an offensive soap factory, a proven public nuisance, but later Lord Eldon issued other injunctions against public nuisances and distinguished this case as barred by laches. The same reluctance to grant injunctions in public nuisance cases in the United States is shown when Kent, C., refused an injunction in *Attorney General v Utica Insurance Company*.⁴⁴

However, equity after this time advanced rather rapidly In *Crowder v Tinkler*,⁴⁵ an injunction issued to remove a building used for storing gunpowder. The court said that where it was a public nuisance at the suit of the Attorney General, equity had jurisdiction. In *Attorney General v Hunter*,⁴⁶ an injunction issued to prevent an erection of a milldam near the State Capitol because it was a public nuisance injurious to health. The courts were not long in expanding its jurisdiction and in *Attorney General v Steward and Taylor*⁴⁷ the court said, "any trade or business, however lawful, which from the place or manner it is carried on materially injures the property of others, or effects their health, or renders the enjoyment of life physically uncomfortable is a nuisance which it is the duty of this court to restrain." Other cases where equity has enjoined public nuisances injurious to health and safety are cited in the notes.⁴⁸

Further advancement by courts of equity to restrain crime assume jurisdiction where the remedy at law may be adequate is found in *Wolcott v Doremus*.⁴⁹ Here the court says, "where it is shown that the safety of users of a highway is imperiled by shooting on premises of a gun club at targets by members of the club, a public nuisance exists and it is the duty of the court to protect the public from injury by injunction regardless of what ever remedy there may be to enforce abatement."

We have seen that equity will issue an injunction to protect public health and safety where a public nuisance has been threatened or is being committed. A further extension of

⁴³ 18 Ves. 210 (1811).

⁴⁴ 2 Johns. Ch. 371 (1817)

⁴⁵ 19 Ves. 617 (1816).

⁴⁶ 16 N. Car. 12 (1826).

⁴⁷ 20 N. J. Eq. 415 (1869).

⁴⁸ 42 Minn. 342; 58 N. J. Eq. 171, 66 California 138; 82 Mich. 471, 99 N. Y. 237.

⁴⁹ 101 Atl. 868 (1917).

equity criminal jurisdiction occurs where zoning ordinance have been enforced.

These cases are somewhat analogous to health and safety in that the enjoyment of one's residential property should not be disturbed by business enterprises. Such disturbance constitutes a nuisance and equity may take jurisdiction. But the case also goes so far as to say it is a nuisance "if for no other reason, it is an example of defiance of the municipal government,"⁵⁰

CONCLUSION

There can be no doubt that the injunction has been used extensively to prevent the commission of crimes from an early period, but in no instance has it assumed jurisdiction to prevent crimes as such.⁵¹ The principle underlying the case is that the government may enjoin certain acts which amount to a crime or a violation of the criminal statutes, not because the act complained of is a crime, but in spite of the fact that it is a crime.

Equity jurisdiction has so grown until today most crimes can be adjudged public nuisances. The rapid advancement of civilization has far outdistanced the ponderous and unwieldy machinery of the law courts, and equity, like the supplement it is, has tried to keep apace. Will we in this mad race speed up the criminal courts of law or have a "government by injunction"?

F. H. HANKES.

⁵⁰ *New Orleans v. Liberty Shop*, 157 La. 26.

⁵¹ 101 So. 798, 40 A. L. R. 1136 and Annotations.